FILED
FEB 16, 1982

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. PEAT MANUFACTURING COMPANY, Respondent.	)	No. 80-7755
	)	MEMORANDUM

On Application for Enforcement of an Order of the National Labor Relations Board

(Submitted February 2, 1982)

Before: WRIGHT and FLETCHER, Circuit Judges, and MEREDITH,* Senior District Judge.

The NLRB applies for enforcement of its order that Peat Manufacturing Company (Peat) cease interference with the employees' exercise of their statutory rights and bargain collectively with the union. Peat cross-petitions for review. We enforce the order.

During the summer of 1978, Peat held meetings with its employees to explain the

EXHIBIT "1"

App. 1

progress of contract negotiations. Peat emphasized the benefits it was offering, but stated that if would never agree to the union's demand for check-off and union shop clauses. Peat explained that it wished its employees to have free choice. Peat also said that if its employees went on strike, they would be permanently replaced.

Two decertification petitions were circulated during that summer. The first was rejected by the NLRB because it fell within the one-year election bar period. The second was given directly to Peat, who promptly withdrew recognition of the union and ceased negotiations. Peat then unilaterally increased wages and instituted other benefits.

Based on this conduct, the ALJ found that Peat had violated § 8(a)(1) and 8(a)(5) by refusing to bargain with the union in good faith and bargaining directly with employees; and by threatening to discharge

---

* Of the Eastern District of Missouri.

employees. Because Peat engaged in unfair labor practices during the negotiations, it could not rely on the decertification petitions to justify withdrawal of recognition of the union.

Substantial evidence supports the ALJ's findings that Peat threatened to discharge strikers. In this context, it was not error for the Board to find the threat coercive: "We look not for certain words that are allowed and others that are forbidden. Rather, we are to view the statements in their entirety and consider their total effect on the receiver." NLRB v. Four Winds Industries, Inc., 530 F. 2d 75, 78 (9th Cir. 1976).

The finding that Peat engaged in direct bargaining is also supported by substantial evidence. Peat's employees could conclude from its statements that Peat, rather than the union, was the protector of their interests.

Substantial evidence also supports the ALJ's determination that employee Taylor was coercively interrogated regarding his union activities. Peat attacks this finding primarily on credibility grounds, but does not show that a clear preponderance of the evidence negates the credibility determination. NLRB v. Carilli, 648 F. 2d 1206, 1211 (9th Cir. 1981).

Having acted to cause disaffection from the union, Peat could not rely on the decertification petitions as indicative of the lack of union support. Clear Pine Moldings v. NLRB, 632 F. 2d 721, 730 (9th Cir. 1980). Peat's argument that a bargaining order is inappropriate given the decertification petitions is meritless.

A bargaining order is the usual remedy for a company's refusal to bargain with an already authorized employee representative when the employer's refusal to bargain follows its campaign to undermine the union. The Board did not abuse its dis-

cretion when it determined that a bargaining order was necessary to restore the status quo.

The assertion that a variance between charges and proof deprived Peat of due process also fails. Peat argues that the complaint charged only coercive statements it may have made in September, not in June as found by the ALJ.

The NLRB may find an unfair labor practice when the issue has been fully litigated even though no specific charge was ever made or amended to the complaint. NLRB v. Carilli, 648 F. 2d 1206, 1211 (9th Cir. 1981). The June statements were raised on direct examination of Peat's witness, and it had full opportunity to explore the issue.

ORDER ENFORCED.

JPT

251 NLRB No. 153

D--6798
Norwalk, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PEAT MANUFACTURING COMPANY

and

Case 21-CA-17094

PRODUCE, REFRIGERATED & PROCESSED FOODS & INDUSTRIAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On April 17, 1980, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

EXHIBIT "2"

The Board has considered the record and the attached Decision in light of the exceptions and briefs [1] and has decided to affirm the rulings, findings, [2] and conclusions [3] of the Administrative Law Judge and to adopt his recommended Order, as modified herein. [4]

ORDER

The order of the National Labor Relations Board is the same as the order contained in the Judgment of the Court of Appeals for the Ninth Circuit, Exhibit "3" herein.

1/ Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

2/ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined

the record and find no basis for reversing his findings.

In sec. IV of his Decision, the Administrative Law Judge concluded that Respondent violated Sec. 8(a)(1) of the Act by bargaining directly with its unit employees. However, in his Conclusion of Law 6 he found, and we agree, that such conduct was violative of Sec. 8(a)(5) and (1).

3/ Respondent excepts to the Administrative Law Judge's conclusion that it violated Sec. 8(a)(1) of the Act in June 1978 by threatening employees with discharge if they engaged in a strike on the ground that such a violation was not alleged in the complaint. We find this exception without merit. Although the complaint did not specifically allege such a violation, the issue was fully litigated at the hearing and the record fully supports the Administrative Law Judge's conclusion. Furthermore, the violation found is closely related to the violations alleged in the complaint. Accordingly, we adopt the Administrative Law Judge's finding of this violation. See Savoy Faucet Co., Inc. d/b/a Savoy Brass Manufacturing Company, 241 NLRB No. 7, fn. 2 (1979).

4/ The Administrative Law Judge concluded, and we agree, that Respondent violated Sec. 8(a) (5) and (1) of the Act by unilaterally granting benefits to unit employees after unlawfully withdrawing recognition from the Union. To remedy this violation, the Administrative Law Judge recommended, inter alia, that, at the request of the Union, Respondent reinstate any terms of employment which existed at the time that it unlawfully withdrew recognition. We shall modify the recommended Order to specify that nothing therein shall be construed as requiring the

rescission of any of the benefits granted to unit employees

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. PEAT MANUFACTURING COMPANY, Respondent.	)	No. 80-7755

JUDGMENT

Before: WRIGHT and FLETCHER, Circuit Judges, and MEREDITH,* Senior District Judge.

THIS CAUSE came on to be heard upon the application for enforcement of an order of the National Labor Relations Board dated August 27, 1980, against Respondent, Peat Manufacturing Company, Norwalk, California, it's officers, agents, successors, and assigns. The Court heard argument of respective counsel on February 2, 1982, and has considered the briefs and transcript of

EXHIBIT "3"

record filed in this cause. On February 16, 1982, the Court being fully advised in the premises, issued its memorandum granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Peat Manufacturing Company, Norwalk, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to discharge employees who engage in strikes, engaging in direct bargaining with employees, interrogating employees concerning their union activities and sympathies, and threatening employees for engaging in union activities.

---

*/ Of the Eastern District of Missouri.

(b) Refusing to bargain collectively with Produce, Regrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), as the exclusive bargaining representative of all employees in the bargaining unit heretofore found appropriate in Conclusions of Law No. 4 of the Administrative Law Judge's Decision.

(c) Bargaining directly with employees in the bargaining unit heretofore found appropriate in Conclusions of Law No. 4 of the Administrative Law Judge's Decision.

(d) Changing wage rates and other terms and conditions of employment of the employees in the bargaining unit heretofore found appropriate in Conclusions of Law No. 4 of the Administrative Law Judge's Decision, without prior notification to and bargaining with the Union as the collective-bargaining

representative of the employees in that bargaining unit.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive bargaining representative of all employees employed in the bargaining unit heretofore found appropriate in Conclusions of Law No. 4 of the Administrative Law Judge's Decision respecting rates of pay, wages, hours, or other terms and conditions of employment and, should any understandings be reached, embody such understandings in a signed agreement.

(b) Upon request by the Union, reinstate any terms of employment existing when recognition was withdrawn from that labor organization as the bargaining representative of the employees in the unit found appropriate in Conclusions of Law No. 4 of the Administrative Law Judge's Decision, and make whole those employees for any loss of benefits which would have accrued to them but for the changes in the terms of their employment following the withdrawal of recognition, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy" (a copy of which is attached hereto as Appendix A); provided, however, that nothing herein shall be construed as requiring rescission of any wage increases or benefits which previously have been granted to unit employees.

(c) Preserve and make available to the Board or its agents all payroll and

other records necessary to compute the back-pay set forth in "The Remedy" section of the Administrative Law Judge's Decision.

(d) Post at its Norwalk, California facility, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 21 of the National Labor Relations Board (Los Angeles, California), after being duly signed by its authorized representative, shall be posted immediately upon receipt thereof and be maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps Peat Manufacturing Company has taken to comply herewith.

Endorsed, Judgment Filed and Entered

SO ORDERED:

JUDGES:

/s/ PHILIP B. WINBERRY
PHILIP WINBERRY
Clerk

/s/ EUGENE A. WRIGHT
EUGENE A. WRIGHT, CJ

/A TRUE COPY,

/s/ BETTY B. FLETCHER
BETTY B. FLETCHER, CJ

ATTEST:

/s/ JAMES H. MEREDITH
JAMES H. MEREDITH, DJ

PHILIP WINBERRY
Clerk/

A TRUE COPY
ATTEST APR 22 1982
PHILLIP B. WINBERRY
Clerk of Court
by: Chas. Sagle
Deputy Clerk

APPENDIX A

THE REMEDY

Having found that Peat Manufacturing Company engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and that certain affirmative action be taken to effectuate the policies of the Act. With regard to the latter, I shall recommend that Peat Manufacturing Company be ordered to resume recognizing and bargaining with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the representative of the employees in the appropriate unit described in Conclusions of Law No. 4, supra, and, further, that Peat Manufacturing Company be ordered to reinstate, upon request by Produce, Refrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the terms of

employment existing before the changes made following Peat Manufacturing Company's unlawful withdrawal of recognition, making whole the employees, with interest, for any losses of benefits that they may have sustained as a result of those changes. See, Republic Engraving and Designing Company, A Division of Nutter, Inc., and Swift Graphics, A Division of Congdon & Crome, 236 NLRB 1150, 1157 (1978), and cases cited therein.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization.

To form, join, or assist any union.

To bargain collectively through representatives of their own choice.

To engage in activities together for the purpose of collective

bargaining or other mutual aid or protection.

To refrain from the exercise of any or all such activities.

WE WILL NOT threaten to discharge you for engaging in strikes.

WE WILL NOT interrogate you concerning you union activities and sympathies.

WE WILL NOT threaten you for engaging in union activities.

WE WILL NOT refuse to bargain collectively with Produce, Refrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of all employees in the following appropriate bargaining unit:

All production and maintenance employees including trainees, inspectors, plant clerical employees,

janitors, shipping and receiving employees, truckdrivers, leadmen and working foremen employed by Peat Manufacturing Company at its facility located at 10700 East Firestone Boulevard, Norwalk, California, but excluding all other employees, office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

WE WILL NOT change rates and other terms and conditions of employment of employees in the above-described bargaining unit, without prior notification to and bargaining with the above-named labor organization.

WE WILL NOT offer to bargain nor bargain directly with employees in the above-described bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed

you by Section 7 of the Act.

WE WILL, upon request, bargain collectively with the above-named labor organization as the exclusive bargaining representative of all employees in the above-described bargaining unit, respecting rates of pay, wages, hours of employment, and other terms and conditions of employment and, if any understanding is reached, embody such understanding in a signed agreement.

WE WILL, upon request by the above-named labor organization, reinstate any terms of employment existing prior to the time that we unlawfully withdrew recognition from it as a bargaining representative of the employees in the above-described appropriate bargaining unit, and WE WILL make you whole for any loss of benefits that you may have sustained by virtue of those changes. However, nothing herein shall be construed as requiring rescission of any wage increases or benefits which

previously have been granted to our unit employees.

PEAT MANUFACTURING COMPANY

(Employer)

Dated_____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, City National Bank Building, 24th Floor, 606 S. Olive Street, Los Angeles, California 90014, Telephone 213--688--5229.

FILED

APRIL 13, 1982

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner, vs. PEAT MANUFACTURING COMPANY, Respondent.	No. 80-7755 O R D E R

Before: WRIGHT and FLETCHER, Circuit Judges, and MEREDITH, Senior District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Fletcher have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35 (b).

EXHIBIT "4"

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.



NATIONAL LABOR RELATIONS BOARD
REGION 21
City National Bank Building
24th Floor
606 South Olive Street
Los Angeles, California 90014
Telephone: 688-5204

November 22, 1978

George A. Pappy, Esq.
Pappy, Kaplon & Vogel
1730 West Olympic Boulevard
Los Angeles, California 90015

Re: Peat Mfg. Co.
Case No. 21-CA-17094

Dear Mr. Pappy:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted. There is insufficient evidence to show that the Employer unlawfully withdrew recognition of the Charg-

EXHIBIT "5"

ing Party. Rather it appears that the Employer withdrew recognition following expiration of the certification year based on a good-faith belief that a majority of its unit employees no longer wished to be represented by the Charging Party. I am, therefore refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on December 5, 1978. Upon good cause shown, however, the General

Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me. If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties.... The notice forms should be mailed the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

Wilford W. Johansen
Regional Director